January 18, 1990

MEMORANDUM

TO: The Honorable Edward Y. Hirata
Director of Transportation

ATTN: Mildred Miyasato, Administrative Officer
Airports Division

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Inspection of Airport Concessioner Revenue Audits

This is in reply to your letter dated August 15, 1989, requesting an advisory opinion regarding public access to airport permittee or concessioner Revenue Audit Reports prepared by, or submitted to, the Department of Transportation, Airport Division ("DOT").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, the public has the right to inspect and copy Revenue Audit Reports prepared by, or submitted to, the DOT, which relate to persons who are either issued a permit to conduct commercial activities at state airports, or who conduct such activities pursuant to lease agreements with the DOT.

BRIEF ANSWER

First, assuming that an airport permittee or concessioner is an "individual," we conclude that their significant privacy interest in the financial information contained in the DOT's

Revenue Audit Reports is outweighed by the public interest in disclosure. Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). Among other things, disclosure of the Reports would reveal whether concessioners or permittees have failed to pay lease rent or permit fees owed to the State, and whether the DOT is diligently performing its duty to administer the leasing of public property, or the issuance of permits granting the privilege to use same. Further, disclosure of the Reports would reveal whether a concessioner or permittee has failed to comply with lease or permit restrictions, such as obtaining insurance which names the State as an additional insured. Lastly, disclosure of the Reports would reveal the revenue the State receives from each concessioner, information which is of great interest to the public.

Secondly, we conclude that the sample Revenue Audit Reports submitted for our review are not protected by the exception for frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes, on the basis that disclosure of their contents would give a "manifestly unfair advantage" to a person proposing to enter a contract with the DOT or by revealing "confidential commercial and financial information." Disclosure of the Reports would not, in our opinion, give a manifestly unfair advantage, over an agency, to a competitor of a permittee or concessioner. Further, although the information contained in the Reports is financial or commercial in nature, it is not "confidential" based upon case law interpreting Exemption 4 of the Freedom of Information Act. The information contained in the Reports is not similar to the detailed commercial or financial information that authorities have found protected under Exemption 4 of FOIA.

Lastly, the "Recommendation" section of the Reports provided for our review is not protected from disclosure by the "deliberative process privilege" insofar as the DOT expressly adopted the views expressed therein in its final decisions.

FACTS

As provided by section 261-7, Hawaii Revised Statutes, the DOT enters into contracts and leases, and issues permits to persons, which grant the privileges of supplying goods, commodities, things, services, or facilities at airports owned or controlled by the DOT, or using space therein for commercial purposes.

Some, but not all, of these concession leases are not subject to section 102-2, Hawaii Revised Statutes, which requires that "concession" contracts or permits be subject to public advertisement and sealed tenders. Specifically, section 102-2(b), Hawaii Revised Statutes, excepts the "operation of ground transportation services at airports," "lei vendors," and "airline and aircraft operations" from the advertisement and bidding requirements of chapter 102, Hawaii Revised Statutes. See Haw. Rev. Stat. § 102-2(b)(1), (2), (3) (Supp. 1989). However, we are informed by the DOT that as a matter of policy, any new concession leases are currently being awarded by competitive bidding.

Pursuant to chapter 261, Hawaii Revised Statutes, the DOT frequently enters into two types of arrangements concerning use of airport property. First, the DOT may enter into a lease agreement with a concessioner, pursuant to which the lessee pays rent based upon a percentage of its gross receipts or the minimum annual guaranteed rental set forth in the lessee's proposal, whichever is greater. Pursuant to the terms of the typical lease provided for our review, the lessee must maintain detailed business records substantiating its revenue, and from time to time, provide the DOT with a statement from a certified public accountant accurately reporting the lessee's annual gross receipts. Further, under a typical lease agreement, the DOT is granted access to "all books, accounts, records . . . showing daily sales" and the lessee agrees to "permit a complete audit to be made by the [DOT's] accountant or by a certified public accountant of the lessee's business affairs and records." Similarly, under the typical lease, the lessee agrees to cooperate fully in making any examination or audit.

With respect to persons granted permits to use airport property, under administrative rules promulgated by the DOT, the permittee pays an annual fee in addition to a fee based upon the percentage of their monthly gross receipts. Additionally, pursuant to the rules, each permittee is bound by law to comply with provisions concerning recordkeeping, revenue audits, and DOT access to records, similar to those contained in the concessioner lease agreements described above. For the most part, these permittees are engaged in greeting services, commercial photography, baggage pickup, or the delivery of merchandise to the airport. For purposes of this opinion, an airport lessee and permittee shall each be referred to as a "concessioner."

The DOT has provided the Office of Information Practices ("OIP") with example copies of concessioners' C.P.A. certifications verifying their annual gross receipts. These certifications, in the usual case, indicate that the concessioner's C.P.A.'s examination was made in accordance with generally accepted audit standards and set forth the concessioner's gross sales, gross income tax, sales subject to rental computation, percentage rent, actual rent paid, and minimum rent due.

Similarly, OIP has been provided with examples of Revenue Audit Reports of concessioners' operations, which were performed by the DOT's Fiscal Office, External Audit Unit. These Revenue Audit Reports are divided into three sections. First, the Report sets forth a "Scope and Opinion" section which generally indicates who has been examined, the period of time encompassed by the audit, the provisions of the lease or permit being examined, the auditor's conclusions concerning the reporting or under-reporting of revenue, and the concessioner's compliance or noncompliance with recordkeeping, insurance, and reporting requirements. The second section entitled "Findings," typically states the concessioner's estimated unreported or under-reported gross revenue and the additional percentage fee that should be paid to the DOT. This section also typically states the auditor's findings concerning the concessioner's compliance with lease or permit provisions concerning recordkeeping, insurance, monthly reporting, and payment of fees. The last section of the report entitled "Recommendations" typically states the auditor's recommendations to the DOT concerning possible action against the concessioner, including the payment of additional fees, mandatory compliance with recordkeeping rules, the adoption of different accounting practices, or the purchase of insurance coverage specified in the permit or lease.

Upon conclusion of an audit, the concessioner is notified, by letter, of the summary of the auditor's findings and the action to be taken by the DOT. The concessioner, however, is not provided with a copy of the Revenue Audit Report.

The Honorable Fred Hemmings requested to inspect revenue audits concerning a specified airport concessioner. As a result of Representative Hemmings request, the DOT has requested an advisory opinion concerning whether the DOT's Revenue Audit Reports (or concessioner's accountant's reports), which verify a

concessioner's gross receipts and permit fees or lease rent paid, are subject to public inspection under the UIPA.

DISCUSSION

The UIPA, the State's new public records law, generally provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). Thus, it is necessary to consult the UIPA's exceptions to mandatory public access to resolve the question presented. Section 92F-13, Hawaii Revised Statutes, provides in pertinent part:

> § **92F-13 Government records; exceptions to general rule.** This chapter shall not require disclosure of:
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> (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
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> . . . .
>
> (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
>
> (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; . . . .

A. **Right to Privacy**

The exception created by section 92F-13(1), Hawaii Revised Statutes, applies only to "individuals," as the UIPA makes clear that in determining whether the disclosure of a government record would constitute a clearly unwarranted invasion of personal privacy, the public interest in disclosure must be balanced against an "individual's" privacy interest. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). Thus, only "natural persons" have a personal privacy interest eligible for protection under section 92F-13(1), Hawaii Revised Statutes.

Assuming that an airport concessioner is a natural person,[1] information contained in the pertinent Revenue Audit Reports is the type of information in which an individual has a significant privacy interest. Specifically, section 92F-14(b), Hawaii Revised Statutes, declares that individuals have a significant privacy interest in "[i]nformation describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities." Therefore, the question presented is whether the "public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. . 92F-14(a) (Supp. 1989).

A review of the sample Revenue Audit Reports provided to the OIP reveals that certain concessioners may have not reported, or may have under-reported, revenues in amounts ranging from $268.00 to $202,473.68. Additionally, the Reports often disclose that a concessioner has failed to comply with DOT's regulations or permit and lease provisions requiring concessioners to maintain comprehensive general liability insurance which names the State as an additional insured. The Reports also may disclose whether the concessioner is submitting the required monthly reports or making timely fee payments to the DOT.

To the extent that a particular concessioner has failed to report or has under-reported its gross revenues, upon which lease rental or permit fees are based, there is an overriding public interest in disclosure of this information. The airport property rented to concessioners, or used pursuant to a permit, ultimately is owned by all the taxpayers of this State. Disclosure of this information would act as a significant check upon potential favoritism by the DOT toward a particular concessioner and reveal whether the public is receiving a fair return upon the leasing of public property. In short, disclosure would reveal the extent to which the DOT is diligently performing its duty to establish and "operate, regulate and protect" state airports under section 261-4(a), Hawaii Revised Statutes. Similarly, there is a significant

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[1] Significantly, all revenue audits submitted for our review concerned corporate concessioners. Corporate concessioners do not have a right to privacy under section 92F-13(1), Hawaii Revised Statutes.

public interest in disclosure of whether a concessioner has obtained and maintained adequate insurance naming the State as an additional insured. Without such insurance, each concessioner subjects the public purse to possible casualty claims by patrons of the concessioner. Additionally, there is a significant public interest in disclosure of the revenue received by the DOT in the form of lease rent and permit fees arising out of the use of public property.

Further, the Legislature recognized the weighty public interest in disclosure of information relating to government contracts under the UIPA. Thus, under the UIPA each agency must disclose "government purchasing information," "leases of State land," "certified payroll record[s] on public works contracts," "contract hires," and information concerning those who borrow funds from the government. Haw. Rev. Stat. § 92F-12(a)(3), (5), (8), (9), and (10) (Supp. 1989). These provisions demonstrate that under the UIPA, those individuals who choose to do business with the government must surrender some degree of privacy concerning the facts surrounding their transactions. Lastly, in balancing a significant privacy interest against a significant public interest in disclosure, it must be remembered that exceptions to public access under public records' laws, like the UIPA, should be narrowly construed with all doubts resolved in favor of disclosure. Department of the Air Force v. Rose, 425 U.S. 352, 361-362, 96 S. Ct. 1592, 48 L. Ed. 2d 11, 1599-1600 (1976).

Based upon the foregoing, we conclude that an "individual" concessioner's significant privacy interest in details contained in the Revenue Audit Reports or C.P.A. certifications is outweighed by the public interest in disclosure, such that section 92F-13(1), Hawaii Revised Statutes, is inapplicable. Finally, as noted earlier, corporations have no recognizable privacy interest under the UIPA.

B. **Frustration of Legitimate Government Function**

With respect to the exception created by section 92F-13(3), Hawaii Revised Statutes, Senate Standing Committee Report No. 2580, dated March 31, 1988, provides guidance and states in pertinent part:

> (b) Frustration of legitimate government function. The following are examples of records which need not

> be disclosed, if disclosure would frustrate a legitimate government function.
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> . . . .
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> (3) Information which, if disclosed, would raise the cost of government procurement or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, ...
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> . . . .
>
> (7) Trade secrets or confidential commercial and financial information; . . . .

S. Stand. Comm. Rep. No. 2850, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

While disclosure of the Revenue Audit Reports and C.P.A. certifications may give some advantage to the competitors of a concessioner, we cannot say that such advantage would be one obtained against the DOT. This language in the Standing Committee Report was meant to protect "agencies" from the disclosure of government records, which would give "a manifestly unfair advantage" to any person over the "agency." While disclosure may assist a concessioner's competitor in proposing a competitive "minimum annual guaranteed rental," we cannot say that DOT would be exploited in the bidding process by disclosure of a concessioner's past gross revenues. Indeed, such a disclosure may make the permit or lease award process more competitive, and thus more favorable to the DOT.

We now turn to the examination of the Standing Committee Report's language which extends the possible protection of section 92F-13(3), Hawaii Revised Statutes, to "confidential commercial and financial information." In this regard, strong guidance may be gleaned from National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) and National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 672 (D.C. Cir. 1976), (hereafter, "National Parks I and II," respectively). The OIP recently adopted the standards set forth in National Parks I and National Parks II which concern the application of the Federal Freedom of Information Act's exemption for "commercial or financial information" which is "confidential." See OIP Op. Ltr. No. 89-5 (Nov. 20, 1989).

At issue in National Parks I and II was whether detailed financial information submitted to the National Parks Service by concessioners granted a franchise to operate commercial facilities in National Parks, in return for the payment of a fee based upon a percentage of their gross revenues, was protected under Exemption 4 of FOIA. The National Park I court reversed the Federal District Court's holding that financial information is "confidential" within the meaning of Exemption 4 of FOIA, if it can be fairly characterized as the type of information that would not generally be made available for public review. Rather, relying upon the legislative history of Exemption 4, the National Parks I court opined that:

> [C]ommercial or financial matter is "confidential" for purposes of this exemption if disclosure is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks I, 498 F.2d at 770.

In applying the above legal principle, based upon the fact that National Park concessioners are required by law to submit the financial information to the government, the National Parks I court reasoned there was "no danger that public disclosure will impair the ability of the government to obtain this information in the future."[2] Id. The court, therefore, remanded the case for a determination of whether disclosure would "cause substantial competitive harm" to the concessioners.

Following remand to the district court, the Court of Appeals for the District of Columbia, in National Parks II, considered whether the district court's decision that disclosure of detailed financial information revealing a concessioner's "assets, liabilities, net worth" and additional "exhaustive cataloging of operating data" would result in substantial competitive harm. The Court, in National Parks II, upheld the district court's decision

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[2] See also CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 n. 143 (D.C. Cir. 1987) (impairment not established where submission of material is mandatory), cert. denied, 108 S. Ct. 1270 (1988).

protecting such financial information as a balance sheet which called for:

> [D]iscrete information as to each concessioner's cash in banks and on hand, marketable securities and investments, notes and accounts receivable, prepaid expenses, fixed assets, and accumulated depreciation . . . notes and accounts payable, mortgages and long-term liabilities, accrued liabilities, and together with their percentage of ownership . . . .

National Parks II, 547 F.2d at 676, n. 9.

However, the court also affirmed the District Court's holding that Schedule B to the concessioner's Annual Financial Report did not fall within Exemption 4 and must be disclosed. According to the National Park Service's Concessions Division, this schedule sets forth the computation of a concessioner's yearly franchise fees. Additionally, according to the United States Office of the Solicitor, Conservation and Wildlife Division, in the wake of National Parks II, the National Parks Service makes public a concessioner's Schedule B, a copy of which is attached hereto as Exhibit 1. Schedule B includes such information as a concessioner's percentage fee, gross receipts, authorized deductions, subconcessioner receipts and fees, and total franchise fees. We are informed that Schedule B is disclosed under FOIA, following the decision in National Parks II.

Turning to the example concession Revenue Audits Reports provided by DOT for our review, we conclude that information relating to the lease rent or permit fees paid, gross revenues reported or under-reported, and percentage fee due the DOT is not eligible for protection under section 92F-13(3), Hawaii Revised Statutes. This information is similar to the information that the National Parks II court found to be ineligible for Exemption 4 protection, and thus, must be made available for public inspection and copying.

On the contrary, should Revenue Audit Reports set forth detailed balance sheet data similar to that before the court in National Parks II, that information would be protected under the UIPA if its disclosure would be likely to cause substantial competitive harm, and if the concessioner is engaged in actual competition. However, none of the Revenue Audit Reports

provided for our review set forth an "exhaustive cataloging of operating data" that was before the court in National Parks II,[3] or in other cases finding Exemption 4 applicable. Should a given Report contain some detailed data which is eligible for protection, under the standards set forth above, the DOT must segregate from otherwise disclosable documents any matters that are confidential. See National Parks I, 498 F.2d at 771.

Further, information concerning a concessioner's compliance or noncompliance with restrictions or provisions contained in their lease or permit should also be disclosed. This information would include, but not be limited to, the fact that a particular concessioner has failed to obtain or maintain the required insurance, follow accepted or required accounting procedures, or maintain adequate records. While this information might be embarrassing, it is not confidential commercial or financial information.

With respect to the "Recommendation" section of the DOT's Revenue Audit Reports, we must examine whether it constitutes material subject to the "deliberative process privilege" under section 92F-13(3), Hawaii Revised Statutes. See OIP OP. Ltr. No. 89-9 (Nov. 20, 1989). This privilege protects government records which include "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 57 L. Ed. 2d 159 (1975).

Three policy purposes have been held to constitute the basis of this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies or decisions before they are finally adopted; and (3) to protect against public confusion that might result

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[3] Attached hereto as Exhibits 2, 3, and 4 are copies of the schedules to a National Parks Service concessioner's Annual Report that were found by the National Parks II court to consist of an "exhaustive cataloging" of a concessioner's commercial operations. As can be seen, they reveal extensive information concerning the concessioner's operations.

from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. See, e.g., Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. Department of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc).

There are two fundamental requirements, both of which must be met in order for the deliberative process privilege to be invoked. First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." Jordan at 774. Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). However, even where the communication is predecisional and deliberative, its protected status may be lost when a final decision "chooses expressly to adopt or incorporate [it] by reference." NLRB 421 U.S. at 161 (emphasis in original). Lastly, the deliberative process privilege does not extend to purely factual matters, or factual portions of otherwise deliberative memoranda. EPA v. Mink, 410 U.S. 73, 87, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973). In the case of the Revenue Audit Reports presented for our examination, we conclude that in each case, the DOT chose to expressly adopt the auditor's recommendations in its final decision. Accordingly, in the case of the examples provided, the deliberative process privilege does not protect this portion of the Reports.

Finally, the letter from the DOT which is sent to the concessioner which reports the audit findings and action to be taken by the DOT in response to the audit is not protected by the "deliberative process privilege" as such letter implements or explains actions that the Department has already taken. See NLRB v. Sears, Roebuck & Co., 421 U.S. at 152; Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980).

Therefore, we conclude that Revenue Audit Reports prepared by the DOT or those submitted by a concessioner's accountant (except for the recommendation section which might be protected under circumstances not present here) and the DOT's letter to the concessioner setting forth its findings and action taken, are not protected under section 92F-13(3), Hawaii Revised Statutes, unless such records contain detailed financial

information similar to that before the court in National Parks II. As stated above, none of the records provided for our review contained such detailed or exhaustive information cataloging a concessioner's operating data. Information relating to a concessioner's gross revenues and the calculation of the fees paid or underpaid by a concessioner should, therefore, be made available for public inspection and copying.

With respect to the exception created by section 92F-13(4), Hawaii Revised Statutes, we could find no state statute which expressly protects from disclosure the government records under consideration in this opinion. Therefore, this exception is similarly unavailing.

CONCLUSION

Disclosure of the DOT's Revenue Audit Reports or C.P.A. certifications would not "constitute a clearly unwarranted invasion of personal privacy" under the UIPA, assuming that an airport concessioner is a "natural person." Any significant privacy interest that a concessioner would have in this information is outweighed by the public interest in disclosure. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). Specifically, disclosure of the Reports would reveal whether concessioners have failed to pay, or have underpaid, lease rent and permit fees owed to the DOT, and whether the DOT is diligently overseeing operation and regulation of state airport facilities as required by statute. Disclosure of the Reports would also reveal the revenues received by the state in the form of lease rent or permit fees, information which is of significant public interest.

Further, based upon samples of the pertinent Reports provided for our review, we conclude that except for the "Recommendation" section of the Reports which might be protected under circumstances not present here, they are not protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, which according to the UIPA's legislative history, protects "confidential commercial and financial information" and information which if disclosed would give a "manifestly unfair advantage to a person proposing to enter into a contract with an agency." First, disclosure of the Reports would not provide an advantage, over the DOT, to a competitor of a concessioner. Secondly, although the information provided in Reports submitted for our review is financial or commercial, it is not

"confidential" based upon case law interpreting Exemption 4 of FOIA, which protects similar information. Specifically, the sample Reports submitted for our review did not contain detailed information concerning a concessioner's operations which would qualify as confidential commercial or financial information.

Lastly, with respect to the "Recommendation" section of the Reports, the examples provided for our review were expressly adopted by the DOT in its final decisions and therefore, are not protected from disclosure by the "deliberative process privilege" which protects agency reports and memoranda, as well as advisory opinions, recommendations, and deliberations which comprise part of the process by which government decisions and policies are formulated.

Hugh R. Jones
Staff Attorney

HRJ:sc
Attachments
cc: The Honorable Fred Hemmings

APPROVED:

Kathleen A. Callaghan
Director